BRITTON BATH OSLER, Q.C.

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MR. B. B. OSLER, Q.C.

Mr. Britton Bath Osler, Q.C., whose portrait appears in this issue, was born in the county of Simcoe in the province of Ontario, on June 19, 1839, being the second son of the late Rev. F. L. Osler, of the Church of England, whose other sons are also distinguished in various ways; the eldest, an eminent member of the Ontario Judiciary, being one of the judges of the Court of Appeal; another, Mr. E. B. Osler, M.P., is a well-known financier; and the youngest, William, is one of the best known physicians on this continent, and head of the medical staff at the Johns Hopkins Hospital.

The subject of this sketch took his degree of LL.B. at Toronto University in 1862, and became a student of the late Wm. Notman, Q.C., Dundas, afterwards being in the office of the Hon. James Patton, Q.C. He was called to the Bar in 1862, at first practising in Dundas and subsequently in Hamilton. He was appointed County Crown Attorney for Wentworth in May, 1879, holding that office until he removed to Toronto in 1882, where he joined the late D'Alton McCarthy, Q.C., and John Hoskin, Q.C., in forming the firm of McCarthy, Osler, Hoskin & Creelman. He was a Q.C. by appointment both by the Dominion and the Ontario Governments, and was elected a Bencher in 1885, and does most valuable work for the profession in that capacity.

His great reputation as a criminal lawyer caused his appointment to assist Mr. Christopher Robinson, Q.C., who had charge of the prosecution of Riel in connection with the North-West Rebellion. In 1890 he acted for the Crown in the celebrated Birchall murder case, and again in the lengthy and important proceedings against McGreevy and Connolly. These are only a few of the many important criminal cases in which Mr. Osler has been engaged. It would take too long to tell of even a tithe of the cases, both civil and criminal, which have brought distinction to him and benefit to his many clients. Though Mr. Osler has not taken much active part in politics, he is not unknown in the ranks

of the Liberals, and he might have occupied a high place had it been possible to entice him from the profession in which he takes so much pride.

As a lawyer prominently before the public, his name has become a household word. That this is so is partly to be accounted for by his great force of character, a large fund of hard common sense, no small supply of that indescribable gift which goes by the name of personal magnetism, qualities which go to make up distinctive characteristics, which are such that all grades of intelligence can comprehend them. That the better mental attributes of humanity are distributed in such proportions in him as to form a well-balanced whole is, perhaps, the explanation of his own understanding of his fellow-men. Placidity, except upon occasions when calmness of temper would be out of place, such as in the cross-examination of an untruthful witness, or the denunciation of injustice, is one of his characteristics. This, with the absence of formality, and an easy, matter-of-fact and patient manner, will be readily recalled by those who have had occasion to consult him, rendering him one of the most accessible of men.

It is in nisi prius cases, both civil and criminal, that Mr. Osler's abilities shine most conspicuously. His success with juries, indeed, has been so remarkable that he may be fairly called the Scarlett of the Ontario Bar. With the exception, perhaps, of his late partner, the lamented D'Alton McCarthy, no one at the Bar was his equal as a skillful cross-examiner. In the conduct of his cases he is resourceful and wary, and in the art of marshalling facts he stands unrivalled. In these qualifications he brings back to the memory the days when John Hillyard Cameron and Henry Eccles were the admiration of a generation fast passing away. Mr. Osler's method of managing criminal prosecutions merits special notice, and has often called forth commendation of the highest character. He has always conceived and carried out in practice a just and humane idea of the function of the Crown prosecutor. This is attested by the aid afforded, under his instructions, to accused persons in enabling them to get their evidence together, and the arrangement of other preliminaries, and especially in his addresses to the jury, which, while presenting the facts with his accustomed force, are nevertheless marked by temperate language and delivery, and are eminently fair to the accused.

His long study and knowledge of human nature, his power of

expression to render himself intelligible to men of all classes, and an even, well-controlled temper, and, perhaps beyond all else, a persistent and intelligently directed industry, are some of the most prominent of those characteristics which have brought to Mr. Osler the honours he bears and to which none of the profession question his right.

The Hon. Albert Clements Killam, one of the Puisne Judges of the Court of Queen's Bench in the Province of Manitoba, has been appointed Chief Justice of Manitoba in the room of Sir Thomas Wardlaw Taylor, Knight, resigned.

Mr. Albert Elswood Richards, M.A., takes the seat vacated by Mr. Justice Killam. Mr. Richards was called to the Bar in Hilary Term, 1874. He was formerly County Attorney at Brockville, but has for many years resided in Winnipeg. He comes of good legal stock being the son of the late Stephen Richards, Q.C., and nephew of Sir William Buell Richards, and of Albert N. Richards, Q.C., of Victoria. We have no doubt but that he will make an excellent judge, and be acceptable to his brethren of the Bar. If he approaches to the standard set by his uncle, the late Chief Justice of the Supreme Court, than whom no better judge ever sat on the Bench in this Dominion, he will do well. We congratulate the new Chief and the new Judge on their appointments.

The sudden departure without leave from the Napanee jail of the two notorious criminals who were the principal witnesses for the Crown in the bank robbery case, throws a somewhat strong light upon the phase of criminal evidence referred to in these pages on a previous occasion (ante p. 91). It is generally thought that sec. 678 of the Code does not cover depositions of a dead, ill or absent witness on a new trial, the provision being apparently limited to depositions taken at a preliminary investigation. This event shows another good reason for the amendment of the law above suggested and now brought before the Dominion Parliament by Mr. B. M. Britton, Q.C. As to the other clauses in this bill, we give to our readers, and to the legislators assembled at Ottawa, the benefit of the views of Mr. E. F. B. Johnston, Q.C. His reasoning upon the points touched upon by him are very cogent, and seems to be unanswerable.

THE CRIMINAL LAW AMENDMENT BILL.

The Criminal Code, representing, in a concrete state, the wisdom and experience of many centuries and of many wise judges and law makers, should not be lightly interfered with by parliament. Nothing is more dangerous to the person or property than uncertainty in the law. The changing of well established legislation to meet some isolated case of supposed injustice, which may, after all, be more imaginary than real, the amendment of procedure, or a change in principle, is a serious matter, and ought not to be consummated without the greatest care.

Mr. Britton, M.P., the mover of a Bill now before Parliament to amend the Criminal Law, is so conscious of this that he has taken the wise precaution of submitting his Bill for suggestions as to the necessity and feasibility of his proposed amendments. As it is the duty of every citizen to aid in enforcing the law, more especially such an important Act as the Criminal Code, so it is equally his duty and privilege to contribute of his knowledge and experience, however humble, to the making of the law. The editors of this journal having asked for my views, I have no hesitation in giving them, trusting that they may be of some use in considering the very radical changes proposed.

Looking at the Bill from the standpoint of a Crown prosecutor of some experience, and as counsel somewhat familiar with defences under the old law as well as under the Code, I shall endeavour to state briefly wherein the objections to the amendments consist, keeping in mind the two great tests—1. Is the proposal just? and, 2. Is it workable?

Section 8 relating to the reading at the trial of depositions taken at the preliminary enquiry, where the witness is dead, or unable to attend the trial, or absent from Canada, retains its original unfair and objectionable features. I pointed out in a previous issue of the current volume of this (ante p. 213) what I think are good reasons against the use of depositions taken in long-hand. If the draftsman of the Bill in question would spend a morning in the police court in Toronto, and hear the evidence there given, and then subsequently read what purports to be the statements made by witnesses, he would be one of the first to amend the Code by repealing the section entirely. If he is

familiar with the depositions taken by ordinary justices of the peace in places outside of Toronto, he would be surprised, in the first place, to find that many of these men were ever appointed magistrates, and secondly, that the evidence as taken by some of them should be allowed to be read in any court, although in some cases I have found the depositions fully and carefully taken down. I venture to say there is no police court managed so successfully, and justice administered more thoroughly and impartially than in Toronto, and in this commendation, I include the Police Magistrate, the City Crown Attorney, and the officers of the court. But the great defect is the method of taking down the evidence, which is simply farcical. This must be the case, considering the immense volume of business which these gentlemen have to do every day of the week. But for the statutory requirement, and so far as practical results are concerned, the evidence heard by a magistrate need not be taken down at all. If taken down for the purposes of the Assizes or Sessions, then it ought to be taken down correctly, and the only way it can be so taken, would be by shorthand, which is sometimes done in serious cases. However, I need not discuss this, as the objections I made in a former issue have yet to be answered, before any further comment is necessary, and I instance the leading magistrate's court in the Province only to illustrate the truth of what is urged herein on this point.

Section 5 of the Bill, repealing s. 593 of the Code, is retrogressive, and smacks of the spirit of the Star Chamber. Why should not every person who knows anything of the facts be called, if necessary, by the magistrate? Is it to be part of our Canadian law that a man shall be committed for trial on a distorted or partial version of the facts, or on a concealment of part of the truth? It is as much the duty of the Crown to put forward all the material facts bearing upon the case, as it is to adduce those only which show guilt. In addition to this, everyone knows that since the amendment allowing the accused to produce witnesses before the magistrate on a preliminary investigation, the Courts have been relieved from the hearing of a number of trumpery cases which were largely the result of spite or misapprehension, and so readily explained before the magistrate that they went no further.

In the great bulk of cases of a commercial character under the Criminal Code, explanations before the magistrate are generally

satisfactory, and not only dispel suspicion, but disprove guilt. These cases now go no further, but according to the proposed Bill, they must be sent for trial, involving a great deal of expense to the country as well as to the individual charged. The more serious crimes are rarely disposed of by a magistrate on preliminary enquiry, if there is any evidence at all against the prisoner. There may be an injustice done in some exceptional cases by magistrates undertaking to try the question of guilt, and it looks as if this sweeping amendment is introduced by reason of a somewhat noted case, which occurred not long ago in the eastern part of this province. Most people think that in the case in question, the magistrate was right, as the evidence then stood, but it is absurd to pass a general law because some isolated case of supposed wrong has been done. Even under the old law, where witnesses were tendered who knew something of the circumstances, and the magistrate refused to hear them, the judges of the Superior Courts, on more than one occasion, expressed themselves very strongly against the action of the magistrate, and if I recollect rightly, there is a case in which a late Chief Justice directed the evidence to be taken. It was always looked upon as a monstrous thing that the magistrate could or would not hear a single word of explanation on behalf of the accused when such explanation would be satisfactory both to the Crown and to the magistrate. Otherwise, the justice was bound to commit, and, in default of bail, the accused went to prison. In such instances, grand juries generally ignored the bills, and in very many cases of true bills, the presiding judge directed a verdict of not guilty. This was entirely due to the then state of the practice, although the law would appear, even before the Code, to have been the other way. Take a very common case. A man charges another with stealing. He says the accused got the money, kept it, and refused to repay it, and he denies any indebtedness to the accused. On this there would be a committal. Put the accused in the witness box. He proves an agreement, or shows by his books or otherwise, a series of dealings or transactions with the prosecutor by which the whole element of crime is eliminated, and yet under the supposed wisdom of the present amendment, the accused would be sent to gaol to await his trial at some future court. Take also, for instance, the case of a merchant who is arrested for fraudulently disposing of goods. Without hearing him and his witnesses, the

case may look very suspicious, and enough perhaps is shown to put the man upon his trial. Hear the version of the accused, and the whole matter is, at most, an unusual, but not a criminal transaction. This is nearly always the condition of things in the case of innocence. Then take the case of guilt. Everyone who is familiar with actual practice, realizes that the most dangerous thing the accused can do is to go into the witness box. The hearing of his evidence before a magistrate assists the Crown more than anything else. In the great majority of cases, he commits and convicts himself.

We therefore gather from practical experience, the following knowledge: 1. In case of innocence, it is proper, just, and in accord with civilized ideas, that the accused and his witnesses should be heard, at least by way of explanation, if not in contradiction. 2. In case of guilt, it is no disadvantage to the Crown to have the accused or his witnesses testify.

Magistrates are not permitted to try a case on preliminary enquiry. If this is violated, then the fault lies with the magistrates and their appointment. If it is not violated, then there is no occasion for the new section. In plain words, if the magistrates are competent men, there is no necessity for the law. If they are incompetent, they ought not to hold office. It would be barbarous to adopt as a rule of criminal practice, that innocent, or merely suspected men should be sent to gaol, and put to unnecessary expense and disgrace, the country saddled with extra cost, and the courts filled with many cases originating in either spite or misapprehension, simply because there are some magistrates who cannot or will not properly perform their duty.

The proposition to constitute the Court of Appeal in Ontario as the appellate tribunal is wise and highly proper. There must be certainty in the constitution of a tribunal before there can be certainty and exact uniformity in decisions, and in no branch of the law are conflicting views more dangerous than in criminal practice and trials.

Why should sec. 748 be repealed? But for this section, which permits the Minister of Justice to order a new trial, the Crown would have put a woman to death, whom a jury, in a trial strictly legal, declared innocent. Had the same case been presented on the first trial as on the second, she would not likely have

been found guilty. It was no fault of counsel, and yet the Divisional Court to whom an appeal was taken, was powerless to deal with the matter, beyond the merest technicalities. The Hon. David Mills, as Minister of Justice, thought, on the whole case, that the ends of justice would be better served by a new trial than by carrying out the sentence of death or by commuting, and the subsequent verdict of a jury, chosen in a county not favorable to the prisoner, justified his wisdom and extreme care in capital offences. I refer to *Reg.* v. *Sternaman.* No relief was possible under the law but for this section It seems absurd to argue that the Crown, represented by its chief officer, may commute, where sentence of death has been pronounced, and yet cannot give effect to the lesser act of granting a new trial where injustice may have been done. A man seeking the recovery of a few dollars may have appeals and rights in our Courts which he cannot have when seeking to save his own life. Ample protection to the public would be given, if the law was amended so that no new trial should be granted except on full argument of counsel for both the Crown and the accused. The only objection to the present law is that the motion is in a sense ex parte.

But the most remarkable feature of the proposed legislation is that relating to crimes against women and young girls. The word "chaste" is to be construed as "free from unlawful sexual intercourse." We have always understood that want of chastity could only be safely proved by repute, aided by proof of certain extraneous circumstances. Direct evidence of sexual intercourse, when tendered by male witnesses, is infinitely more dangerous than circumstantial and reputation evidence. It is generally admitted that men who will swear to illicit intercourse with a woman, do it to help a friend, and are not over-sensitive as to the truth. By the proposed Bill, the safeguards of innocence are demolished, and the road to blackmail smoothed and macadamized. In honest charges, there has always been the obstacle of proving want of chastity, in the path of the defence. Now it will be necessary to prove that the prosecutrix has been, on previous occasions, guilty of unlawful sexual intercourse! How is this to be proved? Reputation will not do it. How could the ordinary case of prostitution be proved, if this definition were applied? How could sexual intercourse be proved, even if the girl has been living

in a house of ill-fame? Show that the girl was generally loose in her habits, that she consorted with immoral men and women, that she was actually found in a house of ill-fame, that all her neighbours and acquaintances are morally satisfied that she is not a woman of chastity, and yet we are far from the proof that she has been guilty of unlawful sexual intercourse. If this fact can be shown by reputation evidence, then the amendment is useless, for it means nothing more than the present law. If the amendment means direct proof of the fact, it will be quite unnecessary to provide want of chastity as a defence, for the section will, in practice, repeal itself. Surely this important matter has not been considered in the light of experience, in the drafting of the new section. If a girl under sixteen has borne a good character, her life up to that period is short and simple, and it is an easy thing to prove chastity, if proof to the contrary be attempted, whereas it is always difficult to prove unchastity in any case, except the most notorious. Juries believe the honest girl, and disbelieve her traducers. Only the strongest kind of evidence will satisfy either a judge or jury that a girl of the limited age has been leading an impure life, and if we add to this the fact, that a finding for the accused is necessary within the meaning of the word "chaste," the loose woman and the prostitute may reasonably hope for better harvests under prosecutions than heretofore. The Crown may show prostitution by repute and so convict. The subject is denied the same right, and so the unequal combat goes on.

Again, the proposed new section, 182, abolishing corroboration, must strike one as unfair and dangerous. When it is considered how little corroboration is required, the law might properly be left as it is. And when we go further and find that no woman can recover in a civil action for breach of promise of marriage, unless there is corroboration, but shall be entitled to destroy a man's life and reputation and take away his liberty, without any particle of evidence being required in support of her story, the anomaly becomes very apparent. Judges of vast experience and a keen insight into things human, sharpened by constant judicial touch with everyday life, have laid down the practice which is now almost a principle of law, that in rape, some degree of corroboration is necessary in the interest of justice. The legislator

wielding an easy pen, can, of course, overrule the result of many years of experience. The wisdom of doing so is another matter.

Make the penalty in these cases as heavy as possible, when guilt is brought home to the prisoner. Let there be no loose or easy loopholes of escape. The roads leading up to the chastity of young girls should be vigilantly and mercilessly guarded by the State. At the same time, there should be a reasonable check on improper or malicious prosecutions, which are too often commenced to gratify revenge, or force a money settlement. The innocent man or the guilty, should not be handicapped in the legal contest. The Crown should have no advantage, nor should the accused be placed at a disadvantage. The absolute fairness of the law is the greatest lever in the administration of criminal justice, and sentences have the greatest weight with the public, when they are the result of an equal struggle between law and crime.

The gravest difficulty in the way of proving this class of offences is not dealt with by the Bill. The proof of age is the great obstacle. It would only be reasonable that some latitude should be allowed the Crown in this respect. Where the judge and jury are satisfied from the appearance of the girl, and from other evidence, although the exact age cannot be shown, that the case is one within the section, the accused, if otherwise proved guilty, ought not to escape. The majority of these prosecutions have failed by reason of this defect in the law, most of those assaulted in this way being orphan children or those sent out by English Homes, and it is found impossible to give strict proof of age. The jury try the issue not upon the actual and absolute facts, but upon the best evidence available concerning them. The finding of the jury is therefore only their conclusion of what they believe, on the evidence, to be the truth. The facts, as shown by imperfect evidence, are as near the truth as we can hope to reach, and the conclusions generally are not far astray.

E. F. B. JOHNSTON.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CORPORATION DISSOLVED—BONA VACANTIA—CROWN, RIGHT OF, TO PROPERTY OF DISSOLVED CORPORATION.

In re Higginson (1899) 1 Q.B. 325, the question presented for adjudication was as to the ownership of a debt proved in bankruptcy by a statutory corporation which is subsequently dissolved. It was contended on behalf of other creditors of the bankrupt that on the corporation becoming defunct the proof should be expunged, and the assets of the bankrupt should be distributed among other creditors as if no such claim had been proved. The County Court Judge gave effect to this contention, but Wright, J., on appeal at the instance of the Crown, reversed this decision, holding that on the dissolution of the corporation the debt became bona vacantia, and as such vested in the Crown, who thus became entitled to the dividend payable in respect thereof. The learned Judge thinks the right of the Crown may be put in either of two ways, viz.: either as being an equitable right which the dissolved corporation, on proof of the claim, acquired to have all the bankrupt's assets applied to the pro rata payment of their creditors, which devolved, on the dissolution of the company, on the Crown as bona vacantia; or on the ground that the dissolved corporation became the cestui que trust of the bankrupt's assignees, and that the Crown took the place of the extinct cestui que trust. He rejected the argument that the Crown would claim the money as "unclaimed dividends" on the ground that an unclaimed dividend means a dividend which has been declared upon admitted and existing proofs, but which the person entitled to it neglects to claim.

PRINCIPAL AND AGENT—AGENT ACCEPTING BRIBE—CONTRACT—NEW TRIAL—SURPRISE.

Shipway v. *Broadwood* (1899) 1 Q.B. 369 was an action to recover the price of a pair of horses sold and delivered by the plaintiff to the defendant. The defendant had agreed to buy a pair of horses, provided they were passed by one Pinkett, a veterinary surgeon, as sound. Pinkett certified the horses in

question in the action to be sound, and the defendant sent a cheque for the price. They were delivered and found to be unsound, and payment of the cheque was stopped, and the present action was then brought to recover the price. At the trial Pinkett was examined as a witness for the plaintiff, and, on his cross-examination, he confessed that the plaintiff had offered him a sum of money if the horses were sold, and that he had accepted the offer. It did not appear what was offered, or that he had actually received the money. Day, J., who tried the action, gave judgment for the plaintiff, notwithstanding this evidence, for the amount of the cheque; but the Court of Appeal (Smith, Chitty and Collins, L.JJ.) unanimously reversed the judgment, on the ground that the conduct of the plaintiff, in offering a secret bribe to Pinkett, vitiated the certificate of Pinkett, on which the sale depended, and without which the plaintiff could not make out a case.

BOND — CONDITION NOT TO COMMIT BREACH OF INJUNCTION — LIQUIDATED DAMAGES — SPEEDY JUDGMENT — SPECIALLY-INDORSED WRIT — RULE 115 (ONT. RULE 603).

In *Strickland* v. *Williams* (1899) 1 Q.B. 382, the action was brought to recover the penalty of a bond, the condition of which was that if the defendant should at all times, in obedience to a perpetual injunction of the High Court, refrain from trespassing on the plaintiff's lands, or the walls, gates or fences thereof, or in closing the same, or from pulling down or otherwise injuring the same, or inciting others to commit any such trespasses, the obligation should be void. The defendant having committed a breach of the injunction, the action was brought, the writ specially indorsed, and an application made for judgment under Rule 115 (Ont. Rule 603), and an order made by Channell, J, from which the defendant appealed. It was contended that the bond fell within 8 & 9 W. 3, c. 11, s. 8; and the condition being against the performance of several different things, the damage in respect of breaches might be quite different, and that the sum secured by the bond was a penal sum, and not liquidated damages, and therefore not the subject of a special indorsement. The Court of Appeal (Smith, Rigby and Collins, L.JJ.) affirmed the order for judgment, holding that the penalty of the bond was in the nature of liquidated damages, because the payment was conditioned on one event, viz., the disobedience of the injunction. See *Star Life Association* v. *Southgate*, 18 P.R. 151.

MALICIOUS PROSECUTION—CORPORATION, LIABILITY OF, TO ACTION FOR MALICIOUS ACT—LIABILITY.

In *Cornford* v. *Carlton Bank* (1899) 1 Q.B. 392, Mr. Justice Darling has decided a point which ever since the obiter dictum of the late Lord Bramwell in *Abrath* v. *North Eastern Ry.*, 11 App. Cas. 247, has been frequently the subject of judicial comment, viz., whether a corporation can be guilty of malice, Lord Bramwell, it may be remembered, declared that "a corporation is incapable of malice or of motive," his opinion being that, while those of the directors or shareholders who maliciously set the corporation in motion might be made liable, the corporation itself could not. This view has failed to meet with approval, and in the present case the point was expressly taken by the defendants at the trial of the action, which was one for malicious prosecution, and, as we have intimated, was overruled, the learned judge preferring to follow the judgment of Fry, J., in *Edwards* v. *Midland Ry.*, 6 Q.B.D. 287, and judgment for £100 damages was given in favour of the plaintiff.

SALE OF GOODS—ORAL CONTRACT—PART PAYMENT—RETENTION OF MONEY DUE ON ACCOUNT OF PRICE—STATUTE OF FRAUDS, S. 17.

Norton v. *Davison* (1899) 1 Q.B. 401 is a case which turns on the Statute of Frauds, s. 17. The action was brought on an oral contract for the sale of goods, and it was a term of the contract that a sum of money which had been overpaid the vendor on some prior transaction should be retained by him and applied on account of the price, and the question was whether this constituted a part payment under the statute. The Court of Appeal (Lords Halsbury, L.C., and Smith and Chitty, L.JJ.) held that the point was covered by the case of *Walker* v. *Nussey*, 16 M. & W. 302, and that it did not amount to a part payment within the Act, and the decision of Wright and Darling, JJ., to the contrary, was overruled, and the judgment of a County Court Judge dismissing the action was restored. "It is plain that the provisions of the Statute of Frauds, and those of the Sale of Goods Act, 1893, which correspond to them, require that, in the absence of a writing, there should be something in addition to the mere oral contract, namely, acceptance and receipt of the goods, or something given in earnest to bind the contract, or part payment in order to make the contract enforceable. Therefore, where the existence of the sup-

posed part payment depends upon a term of the oral contract itself, the statute is not satisfied," per Chitty, L.J.

DAMAGES—BREACH OF CONTRACT—COSTS RECOVERABLE AS DAMAGES.

Agius v. *Great Western Colliery Co.* (1899) 1 Q.B. 413 was an action to recover damages for breach of a contract for the delivery of coal, which was expressly stated to be required by the plaintiffs for shipment in steamers owned by third parties with whom the plaintiffs had contracted. In consequence of the default of the defendants, one of the steamers was detained by reason of the non-supply of coal. The ship owners, therefore, sued the plaintiffs for £150 damages, occasioned by the detention. The plaintiffs notified the defendants of the action, and they repudiated all liability and refused to assume the defence, stating that they considered the claim unfounded and excessive. The plaintiffs defended the action, and paid £20 into Court, and at the trial succeeded in showing that sum was sufficient, and obtained judgment for costs subsequent to the payment in. This course was found to be reasonable by the judge at the trial of the present action; and it was held that the costs which the plaintiffs had been put to in the action brought against him by the shipowners, over and above those received by him for costs as between party and party, were recoverable against the defendants, together with the £20 damages which the plaintiff had paid the shipowners. The dicta in *Baxendale* v. *London, Chatham & D. Ry.* (1874) L.R. 10 Ex. 35, adverse to the right to recover costs as between solicitor and client in such cases, were considered not to be well founded, and *Hammond* v. *Bussey* (1887) 20 Q.B. 79 on this point was followed.

BETTING—BY-LAW—"PLACE OF PUBLIC RESORT."

In *Kitson* v. *Ashe* (1899) 1 Q.B. 425, Lawrance and Channell, JJ., decided that a piece of uninclosed private property to which persons, without permission of the owner, were accustomed to resort for the purpose of betting, was "a place of public resort" within the meaning of a municipal by-law, which provided that "any person who shall frequent and use any street . . . or other place of public resort within the borough . . . for the purpose of book-making or betting . . . shall be liable to a penalty."

COSTS—ACTION DISMISSED FOR WANT OF JURISDICTION—JURISDICTION TO AWARD COSTS.

Watson v. *Petts* (1899) 1 Q.B. 430 was an appeal from a County Court on a question of costs. The County Court Act enables the Court, when dismissing an action for want of jurisdiction, "to award costs in the same manner, to the same extent and recoverable in the same manner as if the Court had jurisdiction therein and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint." The action had been dismissed for want of jurisdiction, with certain costs to be paid by plaintiff, and certain interlocutory costs to be paid by the defendant. The defendant contended that, although there was jurisdiction to order the plaintiff to pay costs, there was no jurisdiction to order him to pay any. Darling and Channell, JJ., however, were of the opinion that the Court had full power over the costs, and had jurisdiction to apportion them as it had done. See *Cote* v. *Halliday*, ante, vol. 33, p. 159.

MUNICIPAL BY-LAW—"APPROVED" PLAN—CONTRAVENTION OF BY-LAW.

In *Yabbicom* v. *King* (1899) 1 Q.B. 444, Day and Lawrance, JJ., decided that, where a municipal body makes a by-law under its statutory powers regulating buildings within its jurisdiction, it has thereafter no power to sanction acts in contravention of such by-law; and where such a by-law laid down certain rules for buildings, the municipality had no jurisdiction to approve of plans inconsistent with such by-law, and a statute which validated plans "approved" by the municipality must be construed to mean "lawfully approved," and not merely approved in fact by such municipality.

DEFAMATION—PRIVILEGE—PLEADING—STRIKING OUT STATEMENT OF CLAIM AS SHOWING NO CAUSE OF ACTION—RULE 288—(ONT. RULE 261).

In *Hodson* v. *Pare* (1899) 1 Q.B. 455, the defendant moved to strike out the statement of claim as showing no cause of action. The action was brought by husband and wife to recover damages for defamation of the wife. The alleged defamation took place on an application before a justice of the peace to detain the daughter of the plaintiffs as a lunatic, and consisted in an answer made to the question "whether any near relative has been afflicted with insanity," to which the defendant, the husband of the alleged

lunatic, answered: "Yes, her mother, with puerperal fever." The Judge in Chambers refused the motion, thinking the matter was one which ought not to be decided in Chambers; but the Court of Appeal (Smith and Chitty, L.JJ.) thought the application might be properly entertained under Rule 288, (Ont. Rule 261), and on the merits granted the application, holding that the occasion on which the alleged defamation took place, being a judicial proceeding, the statement was privileged and no action would lie therefor. See *Hubbuck* v. *Wilkinson*, ante, p. 185.

ADMINISTRATION—CITATION OF PERSON ENTITLED TO ADMINISTRATION.

In the goods of Harper (1899) P. 59, was an application made for administration; the applicant was the sole surviving brother of the deceased. It appeared that the father of the deceased had not been heard of since 1866, when he deserted his wife. Leave to cite the father was refused in the registry, on the ground that, if living, he and not the applicant would be entitled to administration; but on the matter being brought before Barnes, J., he directed the father to be cited.

NEGLIGENCE—SUNKEN WRECK—LIABILITY OF OWNER FOR NEGLIGENCE OF HIS CONTRACTOR.

The Snark (1899) P. 74, is an Admiralty case, in which the principle of *Hardaker* v. *Idle* (1896) 1 Q.B. 335, (see ante, vol. 32, p. 353,) was applied. The defendants were the owners of a barge which, without negligence on their part, was sunk in the fairway of a navigable river. They employed a proper person to conduct the salvage operations necessary to raise the barge, and for that purpose placed him in possession and control; but he negligently permitted the guard-vessel placed to mark the wreck to get out of position, and the plaintiff's steamer, coming up the river without negligence, ran upon the wreck and sustained damage. The defendants sought to throw the liability on the contractor whom he had employed; but Barnes, J., was of opinion that this was a case in which *Hardaker* v. *Idle* applied, as the defendants were bound to use reasonable care to warn other vessels of the position of the wreck, and would not escape responsibility by delegating the duty to another, and he accordingly gave judgment for the plaintiff. See and cf. *Holliday* v. *National Telephone Co.* (1899) 1 Q.B. 221, ante, p. 222.

REPORTS AND NOTES OF CASES

Dominion of Canada.

IN THE EXCHEQUER COURT OF CANADA.

Burbidge, J.] [Jan. 16.

AMERICAN DUNLOP TIRE CO. *v.* GOOLD BICYCLE CO. ET AL.

Patent of invention—Infringement—Pioneer discovery—Evidence.

Where one who says he is the inventor of anything has had an opportunity to hear of it from other sources, and especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed; but credit, under all the circumstances, ought to be given to the witnesses by whose evidence the claim is supported.

W. Cassels, Q.C., *Lash*, Q.C., and *Anglin* for plaintiffs. *Osler*, Q.C., *Ridout* and *Ross* for defendants.

Burbidge, J.] COLPITTS *v.* THE QUEEN. [March 6.

Government railway—Accident to the person—Liability of Crown—Negligence—50-51 Vict., c. 16, s. 16—Undue speed.

It is not negligence per se for the engineer or conductor of a train to exceed the rate of speed prescribed by the time table of the railway. If the time table were framed with reference to a reasonable limit of safety to any given point, then it would be negligence to exceed it; but, aliter, if it is fixed from considerations of convenience and not with reference to what is safe or prudent.

While in actions against railway companies, the law is that the obligation of the company is to carry its passengers with reasonable care for their safety, and it is responsible only for injuries arising from negligence; in actions against the Crown in respect of accidents to the person on Government railways the liability of the Crown must be found exclusively within the provisions of 50-51 Vict., c. 16, s. 16 (c), and the plaintiff cannot succeed unless he establishes that the injury he has sustained resulted from the negligence of some officer or servant of the Crown, while acting within the scope of his duties or employment upon such railway.

A. W. McRae and *C. A. Skinner*, Q.C., for suppliant. *W. Pugsley*, Q.C., and *E. H. McAlpine* for the Crown.

Province of Ontario.

HIGH COURT OF JUSTICE.

Falconbridge, J.] RACHER *v.* PEW. [Jan. 5.

Life insurance—Benefit certificate—Wife and children—Reapportionment by will—Revocation of trust—Validity.

By the rules of a benefit society, the money secured by certificate was payable upon the death of a member to his widow and children; but in this case the member, by a codicil to his will made shortly before his death, which occurred in October, 1886, directed that the moneys payable upon his certificate, which was issued in February, 1884, should be used by his widow to pay off the mortgage upon his farm. The money was paid to the widow, and she used it as directed, giving the plaintiff, a daughter of the deceased, the benefit of maintenance on the farm until she married, at the age of nineteen. The plaintiff claimed her share, alleging a trust in her favour which could not be revoked by the codicil.

Held, following *Videan* v. *Westover*, 34 C.L.J. 162, 29 O.R. 1, that the provision made by the codicil was an apportionment of the fund which the deceased had power to make.

W. Kingston, Q.C., for plaintiff. *Pepler*, Q.C., and *John Dickinson*, for defendant

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Divisional Court.] RE PARKE. [Feb. 13.

Municipal corporations—Nomination of candidate—Keeping open poll after lapse of hour—R.S.O., c. 223, s. 128.

The provision in s-s. 2 of s. 120 of the Municipal Act, which provides for the closing of the meeting for the nomination of candidates for municipal offices after the lapse of one hour only, applies where no more than one candidate is proposed, s-s. 3 applying where more than one candidate is proposed, in which case no time limit is imposed.

W. H. Bartram, for the plaintiff. No one contra.

Divisional Court.] RE THURESSON. [Feb. 14.

Real Property Act—Future estates—Deed of appointment—Statute of limitations.

On the 20th October, 1870, the plaintiff's testator purchased certain lands, and procured a deed to be made to the grantees named therein, to hold such uses as he should by deed or will appoint; and in default of such appointment, and so far as such appointment should not extend, to the use of the said grantees, their heirs and assigns. He put his mother in possession of the land, and she continued in possession up to the time of her death, which occurred on the 21st July, 1878, the defendants, her two daughters, having resided with her, and after her death the defendants con-

tinued to reside on the land, and have been in possession ever since. On 1st November, 1892, the plaintiff's testator, in the alleged exercise of the power of appointment, executed a deed conveying the lands to one "B," who then re-conveyed to him; and on the 19th March, 1897, an action was brought to recover possession.

Held, that the effect of the deed of 25th October, 1870, was to vest the fee simple in the lands in the grantees to uses subject to be divested on the exercise of the power of appointment, and that the deed of November, 1892, was a due execution thereof; that the testator's estate, prior to the appointment, was a future estate or interest within the meaning of s. 5, s-s. 11, of the Real Property Limitation Act, R.S.O. (1879), c. 133, and he had five years from the execution of the deed to bring his action and the plaintiff was therefore entitled to recover.

Aylesworth, Q.C., for plaintiff. *E. D. Armour*, Q.C., for defendant.

Divisional Court.] TAYLOR *v.* SCOTT. [Feb. 17.

Habeas corpus—Issue by judge of High Court—Non-appeal from judgment—Final.

A person confined or restrained of his liberty is limited to one writ of habeas corpus, to be granted by a judge of the High Court, returnable before himself, or before a Judge in Chambers or before a Divisional Court, with a right of appeal to the Court of Appeal, whose judgment is final and conclusive; and where no such appeal is taken, the judgment, which might have been appealed against, becomes final and conclusive, and no other writ of habeas corpus can issue in the matter. Judgment of MACMAHON, J., affirmed.

Boultbee, for the appellants. *H. E. Jones*, contra.

Divisional Court.] ZIMMERMAN *v.* KEMP. [Feb. 21.

Principal and surety — Proof required against surety — Administration bond.

The plaintiff, having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond, and brought an action thereon against the sureties, when W., who had indemnified the sureties, was made a third party, under an order whereby the question of his indemnity was to be tried after the trial of the action, as the judge might direct, with liberty to him to appear by counsel and defend the action, and to call and cross-examine witnesses, and that he should not thereafter be at liberty to dispute the defendant's liability, if any, to the plaintiff. At the trial the judgment was put in, and one of the defendants called as a witness, who stated that the amount of the judgment was correct. W. objected that the liability had not been properly proven as against him, and there should be a reference to

ascertain and determine the defendant's liability, which was refused, and judgment entered for the plaintiff.

Held, that the judgment so recovered was not sufficient to bind the third party, and a new trial was directed.

H. H. Collier, for plaintiff. *J. H. Ingersoll*, for defendant. *Aylesworth*, Q.C., for third party.

Divisional Court.] WALLACE *v.* PEOPLE'S LIFE INS. CO. [Feb. 21.

County Court—Counter-claim—Amount required to be set off.

In an action in a County Court to recover an amount due for salary and travelling expenses, in which there was a counter-claim for advances made to the plaintiff, the plaintiff recovered $308.55, the amount found to be due under the counter-claim, $1,169.54, but only $200 was allowed to be set off.

Held, that the defendants were entitled to judgment on the counter-claim to the full amount of the plaintiff's claim.

Warren, for the defendant. No one contra.

Divisional Court.] BRADLEY *v.* BARBER. [Feb. 21.

Injunction—Injury or threatened injury to goods—Damages.

Under the Judicature Act, R.S.O., ch. 57, s-s. 4, and the County Courts Act, R.S.O., ch. 55, s. 23, s-s. 11, where a cause of action is within the jurisdiction of the County Court, an injunction may be granted to restrain the sale of a specific article which cannot properly be subject of compensation, but not where an injury or threatened injury to goods can be duly compensated by damages.

When, therefore, the plaintiff, who had made an assignment for the benefit of creditors, claimed the ownership and possession of a horse as being an exemption, and brought an action claiming an injunction to prevent the threatened taking of the horse from him and for a declaration of right as to its ownership, and an interim injunction was granted by the judge of the County Court, which, on the finding of the ownership at the trial in the plaintiff's favour was made perpetual and judgment entered for the plaintiff, the judgment was set aside and judgment entered in the defendant's favour.

Morphy, for plaintiff. *Watson*, Q.C., for defendants.

Divisional Court.] RYAN *v.* WILLOUGHBY. [Feb. 23.

Municipal corporation—Contract with—Member interested in sub-contract—Duty to resign office—Refusal to carry out sub-contract—Liability.

The defendant, who was a member of a municipal corporation, and who would be disqualified under section 80 of the Municipal Act, R.S.O., c. 223, from entering into or being interested in a contract with the corporation, entered into a sub-contract to do the brick and mason work of a

town and fire hall which was being erected for the corporation under a contract which contained a provision that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and corporation, the defendant agreeing to resign his seat (though this formed no part of his written contract), but which he afterwards refused to do on the ground that the corporation declined to accept him as a sub-contractor, and a resolution was passed by the corporation to that effect, whereupon the defendant refused to perform the contract.

Held, that the defendant, by his omission to resign, had not done all in his power to enable him to perform the contract, and was therefore precluded thereby from setting up the resolution of the Council as an answer to his non-performance of the contract, and was therefore liable for the damages sustained thereby.

Shepley, Q.C., for plaintiff. *Watson*, Q.C., for defendant.

Divisional Court.] BUCHANAN *v.* INGERSOLL WATERWORKS CO. [Feb. 27.

Prescription—Riparian rights—Artificial channel—Agreement.

About the end of the last century, an artificial channel or water race was built across a lot now owned by the plaintiffs for the purpose of carrying water from a stream above the plaintiff's land to a mill below, the water being diverted into the channel by means of a dam. The channel and the banks on either side of it never formed part of the plaintiff's land, having been excepted therefrom, so that their land was not contiguous to the water. In 1894 an agreement was entered into between the plaintiffs and defendants, whereby the defendants, a waterworks company, acquired the right to lay pipes across the plaintiff's land for their waterworks system, and to use, enjoy and maintain the same for all time for the purpose thereof, and by reason thereof the water, which had previously come down the channel or water race, was carried through the pipes, and the plaintiffs were thereby deprived of the use of the same for watering their cattle.

Held, that the plaintiffs were not riparian proprietors and could not claim any right by prescription to the use of the water, and in any event, if they had any such right, it was put an end to by the agreement.

Aylesworth, Q.C., for plaintiffs. *Nesbitt*, for defendants.

Ferguson, Rose and Robertson, JJ.] [March 4.

RE GILES *v.* THE VILLAGE OF WELLINGTON.

Mandamus—Inutility of—Unnecessary relief—Farm lands—Assessment of—Benefit of certain expenditure—Exemption—By-law—R.S.O., c. 224, s. 8, s-s. 2.

A writ of mandamus will not be granted, when, if issued, it would be unavailing or when there is no necessity for the relief; and an application

for a mandamus will not be allowed to be made the occasion or excuse for obtaining the opinion of the Court on a doubtful question of law, or as to the construction of an Act of Parliament.

When it appeared on the evidence that certain farm lands were not charged or assessed for any of the purposes mentioned in R.S.O., c. 224, s. 2, s-s. 2, a mandamus directed to the reeve and councillors of a village to pass a by-law declaring what part of the farm lands should be exempt or partly exempt from taxation for such expenditure was refused.

Per ROSE, J.—The order appealed against, directing the Council to pass a by-law declaring the lands in question exempt, goes beyond the proper exercise of the powers of the Court, as it takes away from the Council the powers and right to decide as a preliminary question whether there were any farm lands which were or were not benefited, and decides by way practically of appeal what is to be decided by the County Judge under sub-sec. 4 of sec. 8, c. 224, R.S.O., if any appeal is there given. Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., for the appeal. *Clute*, Q.C., contra.

Street, J.] CLARK *v.* BELLAMY. [March 15.

Executor and administrator—Setting apart a fund—Investment of—Non-existence of—Fraud of solicitor—Negligence of executor—Representation—Agency of solicitor—Representations and payments by—Statute of limitations.

Two executors, relying upon the word of a solicitor who had managed the testator's affairs in his lifetime, procured from him a list of mortgages alleged to have been taken by the testator in his lifetime representing a trust fund of $5,000.00, set apart by the will for the widow, but without the actual production of the mortgages, and showed it to her, informing her that the solicitor would pay her the interest. As a matter of fact, the mortgages in the list never had any existence, but the solicitor regularly paid her the interest up to the time of his death.

Held—1. The executors neglected their duty in not setting aside the $5,000.00 in money or securities, and that their duty in that respect could not be delegated.

2. That they had appointed the solicitor their agent for the purpose of paying the interest, and that statements and payments made by him were made in the course of the business for which they had employed him, that each payment was a renewal of the representation that the $5,000.00 was still in their hands invested for her benefit, and they could not be allowed to set up the statute of limitations in answer to the plaintiff's claim, or that the statements they made were not true, and that they were liable to make the fund good.

Clute, Q.C., and *Duncan*, for plaintiff. *S. H. Blake*, Q.C., and *St. John*, for defendant Riseborough, an executor. *W. E. Middleton* and *R. T Harding*, for the defendant Bellamy, an executor.

Ferguson, J.] PULFER *v.* PULFER. [March 17.

Parent and child—Alleged agreement to work farm—Absence of contract or bargain—Services—Wages—Quantum meruit.

In an action by a son against his father for a declaration of his rights under an alleged agreement that, if he would return to his father's farm and remain, he would "make it right" with him, and if he remained and assisted in working it the farm should become his property, which agreement was found not proved on the evidence.

Held, that although he may have continued on the farm in the hope that it might become his, but without any contract or bargain to that effect, and he and his family obtained their living off the farm, he could not recover for wages as on a quantum meruit.

B. F. Justin, for plaintiff. *A. McKechnie*, for defendant.

MacMahon, J.] WATEROUS ENGINE WORKS CO. *v.* PRATT. [March 17.

Contract—Sealed and executed by one party — Revocation — Refusal to accept goods—Subsequent sale by vendor—Damages.

A contract sealed and delivered by one party, although subject to the approval of the other, cannot be revoked, as in the case of an offer made which can be revoked before acceptance.

In an action on a contract for the manufacture of an engine which was signed, sealed and delivered by the defendant, subject to the approval of the plaintiff company, and which the defendant sought to cancel within twelve days of its execution, and before approval or acceptance was notified by the plaintiff company, but which the latter declined to cancel.

Held, that the plaintiff company was entitled to recover.

Held, also, that as the plaintiff company had subsequently sold the engine for the full amount of the contract price for the benefit of the defendant, which they had the right to do, the damages recovered should be merely nominal.

Aylesworth, Q.C., for plaintiff company. *Shepley*, Q.C., for defendant.

Rose, J.] NEWALL *v.* MCGEE. [March 25.

Landlord and tenant—Lease for term of years—Provision for sale of land before termination of lease—Illegal entry by purchaser—Trespass—Incoming tenant.

In a lease for five years containing a covenant by the lessor for quiet enjoyment, the lessee agreed that, if the place were sold and he should receive one month's notice prior to the expiration of any year, he would give up peaceable possession and allow any incoming tenant to plough the land after harvest. Before the expiration of the lease, the place was sold and conveyed to the purchaser, and an assignment of the lease made to

him. In the fall of the year, after the purchase was made and before the lessee had harvested his crop, the purchaser, under protest from the lessee, entered on the land and ploughed it up, thereby causing injury to the lessee.

Held, that the purchaser was a tenant within the meaning of the covenant as to an incoming tenant, but that he had no right to enter on the property before the plaintiff had harvested his crop, and was therefore a trespasser and liable for damages caused thereby, but that no liability was imposed on the lessor under the covenant for quiet enjoyment, it not applying to a case of this kind.

S. F. Washington, for plaintiffs. *A. E. Elliott*, for lessor. *J. H. Elliott*, for purchaser.

Divisional Court.] CANADA PERMANENT *v.* BALL. [April 8.

Principal and surety—Variation of contract—Giving time—Novation—Discharge of surety.

A mortgage of leasehold lands, to secure $5,000 made by three executors, under a will recited such executorship and that the moneys were required for the purpose of the estate, the mortgage being under the short form Act and containing the usual covenant for payment by the mortgagors. In 1888, under a provision therefor in the will, a new executor was appointed, the defendant, one of the three executors, being released, and all his interest vested in his successor and the other two executors. In 1882, while $3,000 still remained due, the land being then greatly diminished in value and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement under seal with the then executors for an extension of the time for payment of the principal, and, though providing for a reduction of the rate of interest, also provided for its being compounded, and that it was to apply as well before as after maturity. The agreement contained a covenant by the then executors to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of the other parties, in the said mortgage premises all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved.

Held, that as between the executors as last constituted and the one who had retired there was constituted the relationship of principal and surety, and by virtue of the agreement of 1882 the latter was discharged; and, further, that it constituted a novation, which also constituted a discharge.

S. H. Blake, Q.C., and *Beaumont*, for plaintiffs. *James Reeve*, Q.C., for defendant.

Robertson, J.] REGINA *v.* PONTON. [April 15.

Venue—Change of—Criminal cause—Fair trial—Riot at former trial—Affidavits of jurors.

Under s. 631 of the Criminal Code, the venue for the trial of a person charged with an indictable offence may be changed to some place other than the county in which the offence is supposed to have been committed, if it appears to the satisfaction of the court or judge that it is expedient to the ends of justice by reason of anything which may interfere with a fair trial in that county; it is not a question as to the jury altogether.

And where at a trial of the defendant, at which the jury disagreed, a crowd of persons congregated round the court house while the jury were deliberating, and endeavoured to intimidate the jurors and influence them in favour of the defendant, and afterwards made riotous demonstrations towards the judge who presided at the trial, the venue was changed before the second trial.

Where affidavits were filed by the Crown to show that the conduct of the crowd must have influenced the jurors, affidavits of jurors denying that they were intimidated were received in answer.

L. G. McCarthy, for the Crown. *Wallace Nesbitt*, for the defendant.

Boyd, C., Robertson, J.] JONES *v.* MASON. [April 19.

Summary judgment — Rule 603—Defence—Validity—Information and belief—Married woman—Separate estate—Foreign law.

In an action upon a promissory note made in the State of New York, the defendants, who were husband and wife, in answer to an application for summary judgment under Rule 603, swore that the note was given upon a certain condition which had not been fulfilled by the payees; that the defendants were informed and believed that the plaintiffs, the indorsees of the note, were suing for the benefit of the payees, and were not holders for value or took it after maturity. The source of the information was not given. The plaintiffs positively denied that there was any notice of any condition. There was no proof that the wife had separate estate in Ontario; but the plaintiffs filed an affidavit made by a counsellor-at-law in the State of New York, who stated that by the laws there in force it was not necessary that a married woman should be possessed of any property, either real or personal, to enable her to contract or to make her contracts binding in law, her right to contract being the same as if she were unmarried. This affidavit was not contradicted.

Held, that no valid defence was shown, and the plaintiffs were entitled to summary judgment against both defendants. *Bank of Toronto* v. *Keiltz*, 17 P.R. 250, followed. *Munro* v. *Orr*, 17 P.R. 53, distinguished.

Masten, for plaintiffs. *W. H. Blake*, for defendants.

Province of New Brunswick.

SUPREME COURT.

Full Bench.] HOPPER *v.* STEEVES. [April 21.

Guardianship in socage.

The owner of a tract of woodland died intestate, leaving a widow and three infant children. Defendant offered the widow, the next friend in this action, $150 for the lumber on the land. She accepted, and the defendant went on and cut the logs. In an action of trespass brought by the children, by their mother as next friend, the plaintiffs claimed that the mother had no right to sell, and also that defendant falsely and fraudulently represented to her the value of the lumber at $150. Defendant moved for non-suit on the ground that the action should have been brought by the mother as guardian in socage. The trial judge overruled the motion and the jury found verdict for plaintiff for $425.

Held, that guardianship in socage does not exist in this province. Nonsuit and new trial refused.

J. H. Dickson, for plaintiff, *M. G. Teed*, for defendant.

Full Bench.] DOMVILLE *v.* JAMES. [April 21.

Arrest—Misnomer—Defendant responsible for plaintiff's mistakes.

Defendant was arrested on a bailable writ in an action of slander by the name of Trewatha James. His real name was William Henry Trewatha-James. He was introduced to the plaintiff in London as Mr. Trewatha James and at the same time his brother was introduced as Mr. Carleton James. The plaintiff had also received letters from the defendant, signed W. H. Trewatha James, (the hyphen being omitted).

Held, on motion to set aside the arrest that the plaintiff was justified in coming to the conclusion that defendant's christian name was Trewatha

L. A. Currey, Q.C., in support of motion. *C. J. Coster*, contra.

Full Court.] BUDD *v.* SHERWOOD. [April 21.

Deed—Error in description—Meaning of parties to the deed.

In an action of trespass, plaintiff relied upon a deed from one Richard Sherwood (through whom also defendant claimed) to Ebenezer Sherwood and by several intermediate conveyances to himself. The description in the deed from Richard Sherwood was, in part, as follows: "Beginning, etc., ... ; then running down river ten chains; thence crossing the river and running a direct course to meet the west corner of David Sherwood's land." Plaintiff contended that the line should cross the river at right angles and thence run to the western corner of a lot then owned

and occupied by Daniel Sherwood, and that the name "David" in the deed was an error, and should have been "Daniel." Defendant claimed that the line should not directly cross the river, but should run along the bank, crossing the river further up, and then to the east corner of a rear lot which had at that time been applied for to the Crown Land Office by David Sherwood. There was evidence as to the corner recognized by Richard Sherwood and Ebenezer Sherwood while in occupation of the respective lots. The Chief Justice, who tried the cause without a jury, found for the plaintiff.

Held, on motion for a new trial, that the verdict should not be disturbed.

J. D. Phinney, Q.C., for plaintiff. *G. F. Gregory*, Q.C., for defendant.

Vanwart, J., at Chambers.] [March 16.

EX PARTE HENRY.

Mechanics' lien—Costs—Stay for appeal—Order directing County Court judge to grant same.

The judge of the York County Court made an order in a mechanics' lien case vacating plaintiff's lien because of a defect in the jurat of the affidavit of verification, with costs of the application. Defendant gave notice of taxation before the clerk of the court, but the latter declined to tax the bill, holding that under the Mechanics' Lien Act he had no power to do so. The judge was called in, and at once entered upon the taxation. Plaintiff's counsel asked that the costs be reduced to 10 per cent. of the amount in dispute between the parties under sec. 66, sub-sec. 2, of the Act, but the judge refused to do so, holding that the section did not apply to an interlocutory application of this kind. A stay of proceedings being applied for to enable the plaintiff to appeal, his Honour refused to grant it.

Held, on an application under s. 15 of the County Court Act, that the County Court judge should have granted the stay.

O. S. Crocket, in support of the motion. *W. Van Wart*, Q.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] TETRAULT *v.* VAUGHN. [March 29.

Tax sale—Assessment Act, R.S.M., c. 101, ss. 148, 190, 191—55 Vict., c. 26, ss. 6, 7.

Issue under the Real Property Act between plaintiff, claiming under a tax sale deed and defendant, the owner, subject to the tax sale. Judgment

given setting aside the tax sale on the following grounds: (1) No resolution of the council of the municipality was passed as required by the statute directing the treasurer to prepare a list of lands liable to be sold for taxes prior to the preparation of same, or until after the reeve had signed the warrant to the treasurer to proceed with the sale. (2) Only one of the two lists of lands for sale was authenticated by the signature of the reeve and the seal of the municipality, whereas the statute, R.S.M., c. 101, s. 148, requires that both lists should be so authenticated. (3) There was no resolution of the council directing the treasurer in what newspaper the advertisement of the sale should be published as the statute requires, where there is no newspaper published in the municipality as in this case. (4) At the sale the land was bought for the municipality, but no resolution was passed by the council prior to the sale authorizing the reeve or any other member of the council to attend and bid.

Held, also, following *O'Brien* v. *Cogswell*, 17 S.C.R. 420; and *Norton* v. *Villeneuve*, 10 M.R. 213, that the effect of ss. 190, 191 of the Assessment Act, R.S.M., c. 101, as amended by 55 Vict., c. 26, ss. 6, 7, is to remedy only irregularities and not absolute nullities, and not to validate sales made on the basis of absolutely void proceedings as in this case. Verdict for defendant in the issue.

Howell, Q.C., for plaintiff. *Munson*, Q.C., for defendant.

Bain, J.] McFADDEN *v.* KERR. [March 29.

Garnishment—Queen's Bench Act, 1895, Rules 425, 742, s. 39, s.-s. 11—What may be attached—Equitable execution.

Plaintiff, a judgment creditor of defendant, had issued and served a garnishing order upon the garnishee, but at the time of such service the only foundation for the claim that there was any debt, obligation, or liability from the garnishee to the judgment debtor was that the latter had previously sold a farm to the former for $1,800 which had been paid in full, and that the garnishee had agreed that if he could at any time sell the farm for more than $1,800, he would do so, and hand over any surplus to the judgment debtor. The latter applied under Rule 425 of the Queen's Bench Act, 1895, to set aside the garnishing order.

Held, that there was neither any debt owing or accruing from the garnishee to the judgment debtor, nor any claim or demand arising out of trust or contract, which could have been made available by equitable execution, nor would it be proper to appoint a receiver under s. 39, s.-s. 11, of the Act, for the claims and demands referred to in Rule 742 of the Act, as re-enacted by 60 Vict., c. 4, are those that could be made available by equitable execution at the suit of the judgment debtor himself, and not at the suit of the judgment creditor; and the former had no cause of complaint or right of action against the garnishee at the time the order was

made. What was meant by equitable execution was the appointment of a receiver by a court of equity in aid of a judgment at law when the plaintiff showed that he had sued on the proper writ of execution and was met by certain difficulties arising from the nature of the property, or the debtor's title thereto, which prevented his realizing out of it at law.

Application granted, with costs to be set-off against plaintiff's judgment.

Hull for plaintiff. *Mathers* for defendant.

Dubuc, J.] MUSSON *v.* G.N.W.C.R. Co. [April 4.

Chose in action—Assignment—Right of assignee to sue in his own name—Assignments Act, R.S.M., c. 1, s. 3—Queen's Bench Act, 1895, s. 38.

The plaintiff's claim was for wages earned by himself and a number of others, whose claims had been assigned to him so that judgment might be obtained for all in one action. Defendants objected that plaintiff could not sue on the assigned accounts as he had no beneficial interest in them, relying on *Wood* v. *McAlpine*, 1 A.R. 234.

Held, that the objection should not prevail as there is no provision in the Assignments Act, R.S.M., c. 1, as there is in the corresponding Ontario Act, requiring that the assignee should have at the time of action brought the beneficial interest in the chose in action assigned; also because, under s. 38 of the Queen's Bench Act, 1895, the court has now equitable jurisdiction in all matters where relief could formerly have been granted on the equity side of the court.

Province of British Columbia.

SUPREME COURT.

McColl, C.J.] *v.* SING. [March 1.

Prohibition—Small Debts Act, s. 15—Magistrate's decision not given in open court.

Summons by defendant for prohibition to the Magistrate of the Small Debts Courts at New Westminster on the grounds that no day was fixed for the giving of the decision which was reserved, and that it was not given in open court. The Small Debts Act, s. 15, provides that every decision of the Magistrate shall be given in open court. The facts were that the trial was on 20th January; that when the decision was reserved without any time being mentioned for its delivery the magistrate's attention was not called to the enactment, the non-observance of which is now complained of, nor was any objection made; that, on 31st January, the magistrate informed Mr. Jenns, who had acted for the defendant at the trial, that after

consulting "with certain carpenters not witnesses in the case, and in consequence of what they said" he had determined to decide against the defendant, and that, on 2nd February, Mr. Jenns received from the magistrate a copy of his judgment given and purporting to have been given on the same day. No objection was made either at the time of the adjournment or when the magistrate told what his decision would be, or at any other time before the issue of the summons.

Held, that the right to a decision in open court may be waived either expressly or by the conduct of a suitor, and in such a case prohibition will be refused. Prohibition refused and time for appealing from the magistrate's decision extended.

Jenns, for the summons.

McColl, C.J.] COQUITLAM *v.* HOY. [March 10.

Asssessment—Person on roll not owner of property—Liability—Municipal Clauses Act, ss. 134, 155.

Action by municipality for arrears of taxes on real estate. The defendant was named in the assessment roll as the owner of the property which really belonged to his wife during all the period of assessment, and he never owned it nor had any interest in it. The Municipal Clauses Act, s. 134, provides that the roll shall "be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in the notice required, or the omission to deliver or transmit such notice; and the roll shall, for all purposes, be taken and held to be the assessment roll of the municipality, etc."

Held, that the mere fact that a person is named in the assessment roll of a municipality as the owner of certain real estate does not make him personally liable for the amount of the assessment.

Quære, whether a person whose name was once properly on the assessment roll would be liable for taxes after he had parted with his interest in the property but had omitted to have his name removed.

Dockrill, for plaintiff. *Reid*, for defendant.

Walkem, J.] HANEY *v.* DUNLOP. April 5.

Writ of summons—Renewal of—Mineral Act, s. 37.

Motion to set aside an order of 3rd August, 1893, for the renewal of the writ of summons in the action. The plaintiff's claim was on behalf of the Legal Tender mineral claim to adverse the defendant's application for a certificate of improvements for the Pack Train mineral claim. The writ was issued in August, 1897, and not having served it before the end of the year the plaintiff obtained upon an ex parte application the order for

renewal. The renewed writ was not served until 19th January, 1899, and at that time the defendant had made application for his certificate of improvements and crown grant to the Pack Train mineral claim, and his application was then under consideration by the Government.

Held, that the plaintiff had not prosecuted his action with reasonable diligence as required by s. 37 of the Mineral Act, and that the order must be set aside.

Duff, for the motion. *A. E. McPhillips*, contra.

Drake, J.] WALT *v.* BARBER. [April 10.

Arrest—Ca. re.—Affidavit—Statement of cause of action—Particulars of, contained in exhibit to affidavit—R.S.B.C., 1897, c. 10, s. 7—Costs.

Application by defendant to rescind order of WALKEM, J., and to set aside order for ca. re. and all other proceedings had by the plaintiff, and to discharge defendant from custody. One of the grounds on which the motion was made was that the affidavits on which the said order was made were not sufficient to hold the defendant to bail. The material part of plaintiff's affidavit was as follows: "That the above-named defendant is justly and truly indebted to me in the sum of two hundred and fourteen dollars and ninety-five cents, according to the endorsement on the writ of summons herein, marked exhibit 'A' to this my affidavit."

Held, that the plaintiff's cause of action should appear in the affidavit leading to an order for a writ of ca. re., and a statement in the affidavit that the defendant is indebted to plaintiff in a sum as appears in an exhibit to the affidavit is insufficient. Proceedings to discharge from custody a person arrested under a writ of capias should be by summons, and where objections are taken to the proceedings on the ground of irregularity, the specific irregularities should be set out.

T. M. Miller, for the motion. *Alexis Martin*, contra.

Walkem, J.] RE NUNN. [April 10.

Justice of the Peace—Jurisdiction—Inquiry commenced by one—Completed by two.

This was order nisi calling upon the keeper of the county gaol at Victoria to show cause why a writ of habeas corpus should not issue, commanding him to bring up Fanny Nunn, a prisoner under bail upon a warrant of committal granted by two justices of the peace, in order that she might be discharged from custody. The prisoner, Fanny Nunn, laid an information in October against one Annie Keats for using threatening and abusive language, and on the hearing before the police magistrate, the prisoner was a witness. Her evidence was subsequently impeached and

proceedings commenced against her for perjury, and the preliminary inquiry opened before one justice of the peace, who heard the evidence of the police magistrate, and then adjourned the hearing. On the inquiry being resumed another justice of the peace sat with the one before whom the proceedings had opened, and the rest of the evidence was taken before the two, who committed the prisoner for trial.

Re Guerin (1888) 16 Cox C.C. 596 referred to.

Held, that where evidence on a preliminary inquiry is commenced before one justice of the peace and finished by two justices, a committal by the two is irregular unless they have heard all the evidence. Prisoner discharged.

C. E. Powell, for applicant.

It will be convenient to publish for easy reference the following rules of the Supreme Court of Judicature of Ontario on December 10th, 1898:

1. The following is substituted for Rule 782 of the Consolidated Rules, viz.: "Where there has been a trial with a jury an application for a new trial, whether made for that relief alone or combined with or as an alternative of a motion under Rule 783, may be made to a Divisional Court, or to the Court of Appeal."

2. The following is added to Rule 783: "(3) The foregoing provisions of Rule 782, and of this Rule are not to restrict or affect the power of the Court of Appeal to direct a new trial in any appeal where such relief appears just and proper."

Book Reviews.

The Yearly Practice of the Supreme Court for 1899. London: Butterworth & Co., 7 Fleet St. E.C., 1899.

This is a new publication and consists of the Judicature Act and Rules, to date, and other statutes and orders relating to the practice of the Supreme Court, with the appellate practice of the House of Lords, supplemented by numerous practical notes. It is difficult to speak of the value of a book of this sort without frequent reference to it, for which time has not as yet obtained, but it gives one the impression of being very carefully and intelligently prepared, and looks as if it would be in time a formidable rival to Snow's Compendium. It is already coming largely into use in practitioners' offices. The names of the editors are in themselves a sufficient guarantee of the work. The first part consists of the Consolidated statutes, the second gives the rules of the Supreme Court and the third contains appendices of forms.